IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0155
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
GENE GREG SMITH,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20052007

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Julie A. Done
Phoenix
Attorneys for Appellee

Robert J. Hooker, Pima County Public Defender
By Frank P. Leto
Tucson
Attorneys for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 After a jury trial held in his absence, appellant Gene Smith was convicted of theft of a means of transportation. The trial court sentenced him to a mitigated prison term

of 2.5 years. On appeal, he contends the trial court's preclusion of a statement he made during an investigative interview following his arrest "deprived [him] of a fair trial." He contends the statement fell within the state of mind exception to the hearsay rule and should have been admitted on that basis. *See* Ariz. R. Evid. 803(3), 17A A.R.S. We affirm.

¶2 On May 7, 2005, sheriff's deputy Christian Gibson stopped a Dodge truck that had been reported stolen. The stop led to the arrest of Smith, who was driving the vehicle. After Smith was detained, Gibson conducted separate, tape-recorded interviews of Smith and his passenger.[1] It is unclear exactly where and when these interviews took place. In establishing a time frame, Smith's trial counsel asked Gibson, "Subsequent to the stop, after all was said and done, both individuals of the car [sic] were arrested and detained; is that correct?" Gibson answered in the affirmative. Counsel then asked, "[a]nd you conducted interviews with both of them; is that right?" Again, Gibson agreed. After further establishing during his cross-examination of Gibson that Smith and the passenger had given consistent stories during their interviews, counsel sought to play the tape of Smith's interview for the jury. The trial court sustained the state's hearsay objections.

¶3 Smith did not argue below, as he does on appeal, that the statements were admissible pursuant to Rule 803(3), Ariz. R. Evid. Nor does the record before us contain

[1]The passenger was also arrested and later entered an *Alford* plea to attempted unlawful presence in a means of transportation. *See North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167 (1970).

an offer of proof as to what exactly the statements were.[2] He has therefore arguably waived his claim that the evidence was admissible under that theory, and we need not consider it. *See State v. Tankersley*, 191 Ariz. 359, ¶ 48, 956 P.2d 486, 498 (1998) (failure to argue specific ground for admission of excluded evidence in offer of proof waives error on appeal).

¶4 Nevertheless, we note that on appeal, Smith characterizes whatever the specific statement might have been as a "statement . . . that he believed he had authority to drive the truck" and "was not stealing the vehicle." He contends such statements were relevant to the elements of the crime charged, which included a defendant's "knowingly" and "without lawful authority" controlling another's means of transportation in a manner that meets the remaining elements of § 13-1814(A)(1) or (5). The state of mind exception to hearsay provided by Rule 803(3) applies only to "[a] statement of the declarant's *then existing* state of mind" and does "not includ[e] a statement of . . . belief to prove the fact . . . believed." Ariz. R. Evid. 803(3) (emphasis added). The limited facts available here suggest Rule 803(3)'s criteria were not met because the statements were made during a post-arrest interview and were offered to prove that Smith had believed before the time of his arrest he had lawful authority to control the truck. *See State v. Fulminante*, 193 Ariz. 485, ¶ 32, 975

[2]The tape was not admitted in evidence and is not included in the record before us. *See* Ariz. R. Crim. P. 31.8(a)(1), 17 A.R.S. Its absence leads us to presume it supports the trial court's rulings. *See State v. Spinks*, 156 Ariz. 355, 360, 752 P.2d 8, 13 (App. 1987).

P.2d 75, 85 (1999) ("the statement must describe declarant's present feeling or future intention rather than look backward").

¶5 The authority from other state and federal jurisdictions cited by Smith are inapposite. In three of those cases, the erroneously excluded statements had been made by the defendants long before their arrests for the crimes with which they were charged, and in accordance with the rule, the statements were made contemporaneously with the state of mind that they were offered to prove. *See United States v. Harris*, 733 F.2d 994 (2d Cir. 1984); *United States v. Parry*, 649 F.2d 292 (5th Cir. 1981); *Kelly v. State*, 116 P.3d 602 (Alaska Ct. App. 2005). In the remaining case, after a period of surveillance, agents from the Federal Bureau of Investigation stopped the defendant's vehicle, and *as they approached*, the defendant stated, "I thought you guys were just investigating white collar crime; what are you doing here? I only came here to get some cigarettes real cheap." *United States v. DiMaria*, 727 F.2d 265, 270 (2d Cir. 1984). In holding the statement had been improperly excluded and was admissible under Rule 803(3), Fed. R. Evid., the appellate court observed, *inter alia*, "DiMaria's remark was not a statement . . . of what he or someone else had done in the past. It was a statement of what he was thinking in the present." *DiMaria*, 727 F.2d at 270.

¶6 Notwithstanding the trial court's preclusion of Smith's statement, the state later asked Gibson whether the version of events Smith and the passenger had provided during the interviews had been "reasonable." Gibson responded, "No." Smith contends that question

and answer "opened the door" to the admission of his statement. But Smith objected to the state's question, and the trial court instructed the jury to disregard both the question and Gibson's answer. We must presume the jury followed that instruction. *See State v. Dann*, 205 Ariz. 557, ¶ 48, 74 P.3d 231, 245 (2003). Smith suggests the trial court nevertheless erred in failing to admit his statements to rebut the stricken testimony under the principle of curative admissibility, citing *State v. Prasertphong*, 210 Ariz. 496, ¶ 20 n.7, 114 P.3d 828, 833 n.7 (2005). Although that principle permits the introduction of inadmissible evidence to rebut evidence wrongfully submitted to the jury, *id.*, its application is discretionary. *See United States v. Whitworth*, 856 F.2d 1268, 1285 (9th Cir. 1988). Moreover, Smith did not seek admission of his statements on a theory of curative admissibility. He merely objected to the state's question. On these facts, we cannot say the trial court abused its discretion in concluding the improper question and the answer to it were better cured by an instruction than by the admission of Smith's otherwise inadmissible statements.

¶7 We affirm Smith's conviction and sentence.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

PHILIP G. ESPINOSA, Judge